REPLY BRIEF FOR PETITIONERS,
MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO.,
AND TRANS-VIDEO CORP.

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21,183

SOUTHWESTERN CABLE CO.,
Petitioner,
v.
UNITED STATES OF AMERICA
and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

No. 21,192

MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO.,
and
TRANS-VIDEO CORP.,
Petitioners,
v.
UNITED STATES OF AMERICA
and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

ON PETITION FOR REVIEW OF MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Of Counsel:

FLETCHER, HEALD, ROWELL,
KENEHAN & HILDRETH
1023 Munsey Building
Washington, D. C. 20004

TUTTLE & TAYLOR
13th Floor
609 South Grand Avenue
Los Angeles, California

FRANK U. FLETCHER
ROBERT L. HEALD
EDWARD F. KENEHAN
JAMES P. RILEY
1023 Munsey Building
Washington, D. C. 20004
Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

ADMINISTRATIVE DECISIONS:

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21,183

SOUTHWESTERN CABLE CO.,

Petitioner,

v.

UNITED STATES OF AMERICA
and
FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

No. 21,192

MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO.,
and
TRANS-VIDEO CORP.,

Petitioners,

v.

UNITED STATES OF AMERICA
and
FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

ON PETITION FOR REVIEW OF MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR PETITIONERS, MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO., AND TRANS-VIDEO CORP.

a Washington agency that most of the San Diego public must view San Diego television programs and not those programs produced by Los Angeles stations, *irrespective of what the San Diego public may want.* The First Amendment was designed not only to prohibit prior restraints that are bad for the public, but also to prohibit prior restraints that may be considered by some well-intentioned government servant to be good for the public, i.e., will serve the public interest. The stay order demonstrates that the Commission does not intend to allow both local and outside television signals to be made available to the public so that the public, after being fully informed, may decide which station it will view and which it will not. Rather, it has decided to prohibit the importation of Los Angeles signals because it has determined that the public must view the signals of local television stations whether it wants to or not. The present order is a prime example of the difference between the legitimate and reasonable limit upon the protection afforded by the First Amendment in order to make as many physical broadcast facilities available to the public as possible by requiring a license to operate a broadcast station, and the unreasonable restraint on this freedom in an attempt to guarantee the continued operation of allocated facilities by prohibiting the origination of competing program services. Moreover, despite Respondents and Intervenors contentions to the contrary, the prohibition against carrying the Los Angeles signals is as absolute a prohibition against originations as would be a prohibition against CATV's using a television camera to present shows. It should be clear that whether the system presents a film program, made by others, on a television film camera, or picks up that same film program from a television signal, it is originating a program. It is submitted that a ban on either procedure is a clear violation of Freedom of Speech.

II

The Federal Communications Commission Lacks Statutory Jurisdiction To Regulate CATV Systems

Petitioners submit that Intervenors' argument, presented on page 46 of its Brief, that this Court need only determine that the Commission's claim of jurisdiction over CATV systems is not patently defective in order to affirm the Commission's order, is clearly erroneous. Intervenors rely upon *Federal Power Commission v. Arizona Edison Co.*, 194 F.2d 679 (C.C.A. 9th, 1952) for the principle that the Court may confine itself to a determination that the Commission has not ". . . patently traveled outside the orbit of its authority . . ." by finding jurisdiction or a lack of same ". . . on the face of the order." Intervenors must be aware that *Arizona Edison* arose on entirely different procedural grounds: The Federal Power Commission sought to secure enforcement of an order in United States District Court, and then appealed an unfavorable decision to this Court. The instant case, on the other hand, is not an enforcement proceeding instigated by the Commission but rather a petition to secure full judicial review of a Commission order, in complete accordance with the judicial review provisions of the Communications Act of 1934. In short, there is no similarity between the procedural background of *Arizona Edison* and that of this case. It is clear, therefore, that there is nothing to bar this Court from considering the jurisdictional issue and, upon a full consideration of the merits, reversing the Commission's Memorandum Opinion and Order.

III

Section 74.1109 of the Rules Adopted by the Commission To Control CATV Systems Is Void for Failure of the Commission To Comply With the Provisions of Section 4 of the Administrative Procedure Act.

All parties appear to be in agreement that Section 4(a) of the Administrative Procedure Act does not require publication in a notice of proposed rule-making of the precise terms of the proposed rules. However, what does constitute sufficient notice is a matter of dispute. Respondents now contend that Petitioners received legal notice both from the Notice of Rule-Making and from the counterproposals contained in the Comments filed by the Association of Maximum Service Telecasters.

Petitioners in their Brief, argued that notice, adequate to comply with Section 4(a) and (b) of the Administrative Procedure Act, was not given by the Commission prior to adoption of Section 74.1109. In this regard, it should be noted that nowhere in the provisions of Section 74.1109 is mention made of "Grade B contours", "distant signals", "100 largest television markets", "major centers of population" or "UHF stations". Thus, most of the material cited from the Commission's Notice of Proposed Rule-Making by Respondents and Intervenors as supplying notice to Petitioners is in fact irrelevant since it in no way advised Petitioners that provisions similar to those contained in Section 74.1109 might be adopted. So far as any notice was given by the cited material, it was notice of the pendency of Section 74.1107, and Petitioners are not challenging the procedures leading to adoption of Section 74.1107. The order before this Court for review is not founded on Section 74.1107, nor is it premised on a finding that Petitioners' CATV systems are carrying "distant" or "beyond Grade B contour" signals.

It is submitted also that Intervenors' and Respondents' reliance upon the comments filed by Association of Maximum Service Telecasters in the rule-making proceeding, as a counterproposal which constituted notice, is misplaced. Nothing before this Court indicates in any way that Petitioners, or any one of them, had actual notice or knowledge of these comments, which are excerpted beginning at page 59 of Intervenors' Brief. These comments were not served on Petitioners, nor was their filing or content disclosed by any public notice of the Commission. One of the Petitioners, Trans-Video Corp., filed reply comments which were directed solely to the comments of Midwest Television, Inc. (Intervenors' Brief, p. 65). Midwest's comments did not propose any rule resembling Section 74.1109.

Petitioners also submit that neither the cited comments nor the listed portions of the Notice of Proposed Rule-making constitute legal notice to Petitioners. Petitioners, in their Brief, contrasted the factual situation of *Owensboro-on-the-air v. United States,* 104 U.S. App. D.C. 391, 262 F.2d 702 (1958), *cert. denied,* 360 U.S. 911 (1959), with the situation in the rule-making proceeding before the Commission which led to adoption of the CATV rules. The subject matter in *Owensboro* was the allocation of UHF and VHF channels in two small communities; the issue as it developed was simply whether these two cities in the Kentucky-Indiana area involved were to be allocated VHF or UHF channels. The number of parties and comments were limited. Each party was aware of what had been filed by the others. It was, in reality, similar to an adversary proceeding. The Court was able to find that the parties attacking the rule-making as being violative of Section 4(a) of the Administrative Procedure Act had ". . . complete awareness of the Commission's proposal and of the counterproposals." *Supra* at 395, 262 F.2d at 706. In contrast, the CATV rule-making dealt with the en-

tire United States, and contained comments filed by a large number of parties, many of which were of great length.[1]

Moreover, *Owensboro* cannot be said to stand for the doctrine that in every rule-making proceeding a counterproposal may cure defects or fill in voids in the notice of proposed rule-making. The Court, in deciding *Owensboro,* was moved to state that its decision rested ". . . particularly on the facts of this case." *Supra* at 396, 262 F.2d 707. The facts of *Owensboro,* running from the degree of specificity of the Commission's original notice of proposed rule-making to the number of parties involved and to the limited number of possible resolutions of the issue, differ starkly from the facts of the proceedings which led to adoption of Section 74.1109.

If the Commission chose to rely on the alternative allowable under Section 4(a)(3) of the Administrative Procedure Act, and meant to publish a notice of proposed rule-making including a description of the "subjects and issues involved", rather than one including the "terms or substance of the proposed rule", it failed to achieve that objective. Viewed in retrospect, as to Section 74.1109, the subject of the notice should have been CATV regulation, and the issue should have been whether to adopt a summary, non-hearing procedure for issuing a stay of CATV activities not found to be in violation of the other sections of the Commission's new CATV rules. Nowhere in the Commission's Notice of Inquiry and Notice of Proposed Rule-making is such an issue set forth. The statement at page 69 of the Respondents' Brief that ". . . one of the basic issues set forth . . . was the potentially harmful effect upon 'free' local television, and particularly the effect upon independ-

---

[1] Contrasted to the six or seven parties participating in *Owensboro*, Appendix A to the Commission's Second Report and Order, 31 F.R. 4540, 4565, lists sixty parties as having filed comments and/or reply comments ". . . on Part I and paragraph 50 of this proceeding . . ."

ent . . . UHF stations, of 'the mushrooming entry of CATV into major centers of population' . . ." fails to support the adoption of Section 74.-1109.

The cases cited in the Briefs of Respondents and Intervenors do not support the contention that the Commission has complied with Section 4 of the Administrative Procedure Act in this proceeding. *Willapoint Oysters, Inc. v. Ewing,* 174 F.2d 676, 685 (C.C.A. 9th, 1949), *cert. denied,* 338 U.S. 860 (1949), cited by the Respondents, accords completely with Petitioners' view that when an administrative body chooses to publish a description of the subjects and issues involved in a rule-making proceeding, it must be so phrased that parties ". . . know exactly what issue they would confront . . ." in the proceeding. *Civil Aeronautics Board v. State Airlines, Inc.,* 388 U.S. 572, 578, 94 L. Ed. 353, 359 (1950), cited by Intervenors, stands for the principle that the prime purpose of the notice requirements of the Administrative Procedure Act is to give the administrative body ". . . the advantage of all available information as a basis. . ." for rule-making or adjudication. Petitioners agree with this statement by the Supreme Court, but submit it has no materiality to the pending issue, since this Court cannot find, as the Supreme Court did in *State Airlines,* that Petitioners were fully aware of any issue in the proceedings before the Commission which could have lead to the adoption of Section 74.1109.

It is also submitted that the contention, raised by Intervenors but not by Respondents, that Petitioners are barred by Section 405 of the Communications Act of 1934, as amended, from challenging the adequacy of the notice is without merit. Section 405 contains no requirement, contrary to Intervenors' apparent assumption, that Petitioners here must have raised this particular point before the Commission. The filing of a petition for reconsideration before the Commission is a condition precedent to judicial review of a Commission order only if the appellant was not a party to the proceedings before the Commis-

sion, or reliance is placed on ". . . questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass."

The Commission has had an opportunity to pass on the question of compliance with Section 4(a) and (b). For example, a petition for reconsideration of the Second Report and Order in Docket Nos. 14895, 15233 and 15971 was filed by Cox Broadcasting Corporation.[2] The petition for stay of the rules adopted by the Second Report and Order, filed by Cox Broadcasting Corporation, incorporated by reference all the arguments in the Petition For Reconsideration. The Petition For Stay was denied on May 25, 1966.[3]

Petitioners were parties to the proceedings before the Commission resulting in the order presented here for review, and the Commission has had opportunities to pass on all of the questions presented for review. For this reason, Section 405 of the Communications Act contains nothing to bar this Court's review of the adequacy of the notice given to

---

[2] "By totally failing to approach even some degree of specificity in its April 23, 1965, Notice with respect to the details of the Second Report and Order, the Commission has violated Section 4(a) and (b) of the APA and must, therefore, reconsider and repropose the *specifics* of the new CATV regulations. As a matter of fact, Docket 15971 clearly led Petitioners to believe that they would definitely be allowed to state their views, both orally and in writing on the details of any proposal." Petition for Reconsideration, Cox Broadcasting Corporation and Cox Cablevision Corporation, April 18, 1966, p. 15.

[3] In the petition for stay, filed before the Commission by Cox Broadcasting Corporation, et al., the entire Cox petition for reconsideration was incorporated by reference. (Petition for Stay, Dockets Nos. 14895, 15233, 15971, Cox Broadcasting Corporation, April 18, 1966, p. 2.) The Commission denied the petition for stay, saying, "Our action was not taken without adequate prior notice to potential CATV operators and local franchising authorities. The Notice of Inquiry and Notice of Proposed Rule-Making in Docket No. 15971, issued on April 23, 1965 and published in the Federal Register (30 F.R. 6078) put all persons on legal notice that the Commission might take action of a substantially similar nature." *CATV Regulation*, 7 Pike and Fischer, R.R. 2d 1627, 1639 (1966).

determine if it complies with the provisions of Section 4(a) and (b) of the Administrative Procedure Act.

IV

Summary

It is submitted that the Respondents' and Intervenors' argument in this case clearly illustrates the growing tendency of administrative agencies to assert jurisdiction over any activity that is in any way related to the area in which they have specific authority, without regard to the intent of Congress or the language of the statute. It also is a logical extension of the argument made time and time again by Respondents in broadcast cases that, while everyone is entitled to freedom of speech, any regulation or rule the administrative agency makes, which in its opinion serves the public interest, is a reasonable restraint no matter how much it affects the public's right to be informed or a citizen's right to communicate.

Petitioners submit that the Communications Act was never designed to give the Commission authority to provide or deny broadcast signals to any community except insofar as it was necessary to protect the commission's duty to license or allocate broadcast facilities in order to make the greatest number of stations available to the greatest number of people. In a like manner, it is clear that the Commission cannot limit what the public may hear simply to ensure that the facilities previously made available to a community will be used whether the public wants them or not. The issue in this case is very simple. Who is to be the ultimate judge of the public interest in program information — the American public or an administrative agency in Washington? Petitioners submit that the answer is clear — both Congress and the Constitution place that responsibility in the American public.

For these reasons, the Memorandum Opinion and Order of the Federal Communications Commission granting a temporary stay of Petitioners' right to carry the signal of the Los Angeles television stations and designating the proceeding for hearing should be reversed and remanded with instructions to set aside the temporary stay and dismiss the petition of Midwest Television, Inc.

Respectfully submitted,

Frank U. Fletcher
Robert L. Heald
Edward F. Kenehan
James P. Riley
Attorneys for Petitioners

Of Counsel:

FLETCHER, HEALD, ROWELL, KENEHAN & HILDRETH
1023 Munsey Building
Washington, D. C. 20004

TUTTLE & TAYLOR
13th Floor
609 South Grand Avenue
Los Angeles, California

APPENDIX

[577]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 66-683
86403

In the Matter of the Petition of

MIDWEST TELEVISION, INC. (KFMB-TV)
San Diego, California

For Immediate Temporary and for Permanent Relief against Extensions of Service of CATV Systems Carrying Signals of Los Angeles Stations into the San Diego, Area.

Petitioner

MISSION CABLE TV, INC.
El Cajon, California

SOUTHWESTERN CABLE CO.
San Diego, California

PACIFIC VIDEO CABLE CO., INC.
El Cajon, California

TRANS-VIDEO CORP.
El Cajon, California

RANCHO BERNARDO ANTENNA SYSTEMS, INC.
La Jolla, California

and

POWAY CABLE TV
Poway, California

Respondents

DOCKET
NO. 16786

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioners Bartley and Loevinger dissenting; Commissioner Johnson not participating.

1. The Commission has before it for consideration a petition filed on March 17, 1966, by Midwest Television, Inc., (Midwest) licensee of KFMB-TV, San Diego, California, a supplement thereto filed on April 4, 1966, and responsive pleadings in connection therewith.[1/] The petition

---

1/ The following responsive pleadings have also been filed and considered: Comments of Jack O. Gross, (Gross) permittee of Station KJOG-TV, San Diego, filed on April 15, 1966; Opposition to petition and supplement filed by Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-

was filed pursuant to Section 74.1107 and 74.1109 of the Commission's Rules, adopted March 8, 1966, effective March 17, 1966 (31 F.R. 4540) 2/, and requests basically that the Commission immediately order respondents, pending final disposition of the petition, to cease and desist from extending service to additional subscribers served by their respective systems within the Grade A contours of the San Diego stations and, after any necessary hearing, issue a final order appropriately confining carriage of Los Angeles television signals by respondents' San Diego area systems. In its later pleadings, Midwest modified its initial request for temporary relief to a request that respondents be directed not to extend the Los Angeles television signals to subscribers beyond the specific geographic boundaries of areas in which subscribers were being served on February 15, 1966.

2. In support of its requests for relief, Midwest states that respondents are the holders of franchises to operate CATV systems is-

sued by the cities of San Diego, Chula Vista, National City, La Mesa, Imperial Beach, El Cajon, and San Diego County.3/

1/ (continued)

Video Corp. (hereafter collectively referred to as Mission) on April 18, 1966; Opposition to petition and supplement filed by Southwestern Cable Co. (Southwestern) on April 18, 1966; a Statement of Position filed by Southwestern on April 18, 1966; a Motion to Sever filed by Southwestern on April 18, 1966; A Motion to Dismiss filed by Southwestern on April 18, 1966; an Opposition and Petition to be Dismissed filed by Rancho Bernardo Antenna System (Rancho) on April 18, 1966; a Reply of Petitioner to Opposition to petition for immediate temporary relief and Answer to Motion to Dismiss petition for immediate temporary relief filed by Midwest on April 25, 1966; an Answer to Motion to Sever filed by Midwest on April 25, 1966; a Reply of Petitioner to Opposition to petition for permanent relief and Answer to Motions to Dismiss petition for permanent relief filed by Midwest on May 2, 1966; and a Reply to Answers of Midwest to Motions to Sever and Dismiss filed by Southwestern on May 5, 1966. Additional interlocutory pleadings concerning extensions of time were filed and have been acted upon, pursuant to delegated authority. On April 6, 1966, Poway Cable TV filed a motion asking that it be dismissed as a party respondent; Midwest filed an answer stating that in view of the agreement reached, it would be appropriate to dismiss Poway as a party. We will grant this request.

2/ Section 74.1107 of the Commission's Rules relates to CATV systems operating or proposing to operate in one of the top 100 television markets and carrying distant television stations' signals. Section 74:1109 of the Rules relates to the filing of petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

3/ Trans-Video is 100% owner of Pacific Video, majority owner of Mission Cable and has a minority interest in Southwestern. It has no franchises

The City of San Diego has a population of approximately 648,500 occupying 208,631 housing units and the County of San Diego has a population of approximately 1,213,000 occupying 379,483 housing units; nearly all of the county population lies within the Grade A contour of KFMB-TV and San Diego is ranked by the American Research Bureau as the 54th market based on net weekly circulation. San Diego is presently served by five television stations, a construction permit has been issued for Channel 51 (KJOG), an application is pending for Channel 15, and the assignment of an additional UHF commercial channel to San Diego is under consideration in Docket No. 14229. Midwest alleges that respondents' CATV systems carry the signals of between six and nine Los Angeles television stations none of which stations provide measured or calculated Grade B service to more than the northern portion of the city of San Diego nor to any parts of six other separate communities adjacent to the city; that all of Mission's systems except Poway supply regularly eight Los Angeles stations beyond their calculated Grade B contours (Mission's Poway system carries three beyond Grade B signals and the independent Poway system carries two); that neither Poway nor Rancho Bernardo receive actual Grade B service from any Los Angeles stations; and that Southwestern supplies regularly to all of its subscribers at least three Los Angeles stations beyond their calculated Grade B contours.

3. Midwest goes on to allege that within the past year, and increasingly in recent months and weeks, there has been "widespread and intensive CATV activity within KFMB-TV's Grade A contour" and that service to Poway, Chula Vista and Pacific Beach was instituted only two to four months prior to the filing of the petition. It is alleged that the other systems have greatly extended their lines and substantially increased the number of subscribers since April of 1965; that the systems have increasingly emphasized the laying of lines, far out-

stripping the solicitation and hooking up of new subscribers, with cables being strung in some areas for miles with very few drops and in some cases none; and in those communities where the systems are operational or wired, only portions of such communities are involved. Midwest estimates that as of February 15, 1966, there were 17,000 homes in the county and within the station's Grade A contour connected to cable systems, of which approximately 6,500 were located in the city; that while this constitutes only 4.6% of the county homes within the station's Grade A contour, there are at present approximately 294,000 homes in the communities within this contour in which CATV systems carrying Los Angeles signals have begun to operate and this figure represents approximately 78% of all homes in the county within the Grade A contour. Approximately 90% of all homes in the county within the station's Grade A contour are

---

3/ (continued)
and is a management company. Trans-Video operates under contract the CATV systems owned by and franchised to Mission, Southwestern and Pacific.

alleged to be in areas covered by CATV franchises. Because of the alleged emphasis on line extensions rather than on hook-ups, Midwest contends that a large number of new subscribers could be wired up in a relatively short time even if there were no further cable expansion.

4. Midwest contends that the importation of a multiplicity of distant signals will, if allowed to expand, fragment and drastically reduce the local stations' viewing audience notwithstanding the non-duplication rules. Midwest points out that in its case, 44% of its programming is non-network and will be subject to duplication and that, with respect to the San Diego independent stations, nearly 100% of their programming

will be subject to duplication; that virtually all of the non-network recorded programs now under contract to the San Diego stations are also under contract or available to the Los Angeles stations; that the importation of such programs impairs their value to the San Diego stations and causes audience losses, eventually resulting in reduced advertising revenues and curtailed local and quality programming; that over 94% of the Los Angeles programs carried on the respondents' systems in a given week have been, are being, or will be duplicated on San Diego stations in the same form or by way of San Diego equivalents; and analysis of the remaining 6% indicates that the same public interest is or would be served in an alternate way by the San Diego stations.

5. Midwest also alleges that respondents' systems, with the exception of Poway Cable TV, carry the signal of KFMB-TV on channel but materially degrade the quality of the signal broadcast, particularly the color signals; that the signal of the local UHF station, KAAR, is markedly worse on the cable than those of the VHF stations; that the signals of the Los Angeles stations appear better on the cable than those of the local stations despite the fact that the Los Angeles stations generally do not place a Grade B signal over San Diego; and that the effect of degradation has been not only to damage the local station's reputations but has placed the distant signals on a higher competitive level than the local signals.[4/] Finally, Midwest contends that in addition to the foregoing considerations, the CATV situation in San Diego falls squarely within the principle enunciated in the Second Report in footnote 69, where the Commission pointed out that, although, in general, CATV activity which does not involve extension of a signal beyond its Grade B contour may continue, an important exception exists where two major markets fall within one another's Grade B contours. In such a situation, the carriage by a CATV system in Baltimore, for instance, of the Washington signals might equalize the quality of the distant signals, change

the viewing habits of the local population and affect the development of local

---

4/ Midwest states that because of degradation, the Pacific Beach system carries KFMB-TV on Channels 8 and 2, but that this dual carriage confuses the public, weakens its station identification and causes possible ratings losses.

television stations. Midwest contends that the San Diego-Los Angeles situation is a classic illustration of this problem and that relief should be afforded on this basis as well as the basis previously set forth.

6. In view of the above, Midwest requests, essentially, that the Commission issue a final order appropriately confining carriage of Los Angeles signals by respondents' systems and that, if a hearing is necessary, the respondent be ordered to confine delivery of the Los Angeles signals to subscribers located within the specific geographic boundaries inside of the general geographic areas where the systems were operating on February 15, 1966.5/ In a document filed on April 15, 1966, Jack O. Gross, holder of a construction permit for UHF station KJOG-TV, Channel 51, San Diego, supports the Midwest petition and states that a grant of the requested relief would materially contribute to the success of UHF in San Diego generally and KJOG in particular.

7. Mission's opposition, filed on behalf of Mission, Pacific and Trans-Video, contends that the Commission can only issue temporary relief in accordance with the provision of Section 312 of the Communications Act (47 U.S.C. 312(c)) and that there is no statutory authority for the type of relief requested. Mission contends that such relief is analogous to a motion for stay and that, as such, it is inadequate because Midwest has failed to show irreparable injury to itself (Mission

contends that Midwest's allegations in this regard are only conclusionary and not supported by material facts); has failed to demonstrate injury to the public (Mission contends that allegations in this regard are also conclusionary and highly speculative and denies that there is any degradation of the San Diego stations' signals by the CATV systems); and has not demonstrated that there is a likelihood that it will succeed on the merits (Mission contends that Midwest's allegations relating to a "pell-mell" extension of cable lines are completely unsupported by facts, is untrue, and that respondents have merely continued their normal wiring activity).

8. Mission alleges further that there is nothing in the rules which prohibits the actions of respondents which Midwest seeks to prevent since the rules speak of extension of signals to "new geographic areas" and Midwest has not factually supported its allegation that there has been such an extension. Further, Mission contends, Midwest has

---

5/ In support of its request for temporary relief pending the outcome of any hearing, and in an attempt to describe the extent of respondents' operations in San Diego and southwestern San Diego county as of February 15, 1966, Midwest filed a Supplement to its petition, to which it attached a map purporting to show that there were eight separate islands of CATV subscriber service as of February 15, 1966 located in recognized geographical areas in San Diego which were further circumscribed by recognizable and known geographical limitations and boundaries within the larger geographical areas. In the Supplement, Midwest alleges that since February 15, 1966, the respondents have extended lines and service beyond the specific boundaries within the general areas and also into entirely new geographic areas.

failed to show that the signals extended are beyond predicted Grade B and it is Mission's position, in any event, that its Poway system is "grandfathered" under the rules since it was franchised under the San

Diego county franchise; service had commenced prior to March 17, 1966, and the county-wide franchise authorized CATV at any place in San Diego county outside of corporate limits.[6/] Mission states that the outside-of-corporate limits construction in San Diego has proceeded to the point where approximately 70% of the populated area adjacent to metropolitan San Diego has been wired and 30% of the homes in the wired area have subscribed. Finally, Mission alleges, with respect to the request for temporary relief, that the public will be irreparably injured since it ignores the need for expansion of television service, prevents expansion of educational television, deprives the public of improved color reception, municipalities of revenues from CATV and potential subscribers of the same choice of programs that their neighbors who have already subscribed have; that respondents will be irreparably injured since their franchises may be forfeited if construction is delayed, contract rights may be lost, and respondents' employees may lose their jobs; the Commission's Rules are yet untested and are probably illegal; and the rights of Midwest or the public can be fully protected by a decision on the merits, after a hearing, if the Commission determines that any action is required.

9. As to Midwest's request for permanent relief, Mission incorporates its same arguments with respect to the request for temporary relief and contends further that its franchises were obtained before the Commission decided to exercise jurisdiction and that construction and installation of cable was started before February 15, 1966 or March 17, 1966. Additionally, Mission alleges that while CATV is a less expensive and more convenient type of antenna service for signals already present in San Diego, CATV is needed in certain areas in order to provide adequate reception of San Diego Channels 8 and 10 and that CATV expansion is necessary for the acceptance and viability of UHF stations. Mission points out that since the San Diego stations' programs cannot be duplicated on the same day and surveys show that

6/ Midwest had alleged, in its petition, that Mission's system in Poway had commenced operations after February 15, 1966 in violation of Section 74.1107 of the Rules, and requested that the Commission issue a cease and desist order as to said system. On April 6, 1966, after an independent inquiry, the Commission issued an Order to Show Cause why a cease and desist order should not be issued with respect to the Poway operation. FCC 66-292, April 6, 1966. On June 22, 1966, the Commission issued a Cease and Desist Order as to Mission's Poway system. FCC 66-548.

[583]

during prime time the San Diego stations have 84% of the viewing audience, it does not appear that fragmentation of the remaining 16 to 20% of the television audience, among the four or five Los Angeles independents and the San Diego UHF, could have any serious impact on the ability of the San Diego network stations to continue their operations. Finally, Mission contends that the addition of subscribers to its systems after February 15, 1966, does not constitute extensions to new geographical areas since, under its city franchises, the appropriate geographic boundaries are the city limits and, under its county franchises, the appropriate boundaries are the unincorporated areas of the county. 7/ In view of all of the above, Mission requests that Midwest's petition, both as to temporary and permanent relief, be denied.

10. Southwestern filed an Opposition, a Motion to Sever, and a Motion to Dismiss. 8/ In its pleadings, Southwestern alleges that the petition must fail since Midwest has failed to show that its system is carrying beyond Grade B signals and that Southwestern's engineering studies show that the commercial television signals which it is carrying are all of Grade B intensity. Southwestern further contends that its system is "grandfathered" since it began operating prior to February 15, 1966, is not expanding throughout the entire community or into new

areas, and has only continued normal wiring operations. Moreover, Southwestern alleges that its system helps UHF and that while Midwest has submitted no probative data regarding impact, Southwestern's market study, a copy of which it attached as an exhibit to its opposition, shows that CATV helps UHF generally and Channel 39 specifically since carriage of the UHF station on the cable increases the station's audience, improves its picture quality, and provides greater penetration for, and viewing frequency of the station. Southwestern also points out that Midwest's claim of signal degradation does not relate to its system since it has always carried Midwest's station on channels 8 and 2 of the cable. Southwestern also claims that its franchise area is unique since the residents and antennas in that area are oriented to the Los Angeles stations and since it is within the predicted or measured Grade B contours of the commercial signals of the stations carried on its system. Southwestern contends that Midwest's showing of fragmentation has no applicability

---

7/ Mission submitted a map with its opposition showing the area of each franchise; the portion of each franchise receiving service prior to February 15, 1966; the portion of each franchise receiving service after February 15, 1966; and the portion of each franchise which was "fielded" and/or under construction as of April 12, 1966.

8/ Southwestern also filed a Statement of Position which is being treated in connection with the petitions for reconsideration of the Second Report and Order.

to its system since the survey was conducted in a part of San Diego where the off-the-air reception of the Los Angeles stations is of less quality, the survey was conducted prior to the commencement of service by Southwestern and the various sections of San Diego vary significantly, and the audience survey findings relate to areas of San Diego where the CATV systems carry the full schedules of the Los Angeles

CBS and NBC stations while Southwestern's system carries only the San Diego CBS and NBC stations. Finally, Southwestern alleges that while Midwest has failed to show that it would be irreparably injured by denial of the temporary relief, Southwestern would suffer irreparable injury since a grant of temporary relief would dry up Southwestern's financing and cause bankruptcy. As to the request for permanent relief, Southwestern contends that while Midwest has essentially requested the Commission to designate a "Carroll" type issue, it has completely failed to furnish detailed evidentiary material. Accordingly, Southwestern requests that it be severed from the other respondents and that the petition and supplement, insofar as they relate to it, be denied or dismissed.

11. Rancho Bernardo, in its opposition, states that it operates a system in northern San Diego under a franchise from the city of San Diego and that the system is part of a housing development of 5,400 acres, approximately 400 acres of which have been developed. The system is designed to serve only the residential community and there is no intention of extending beyond those boundaries. Rancho Bernardo states that there are now approximately 1,000 subscribers to the system or 99% of the occupied housing units and service is expanding in an orderly fashion to serve all the new residential units with the timing of service extension being determined solely by the sales of residential units. Rancho Bernardo contends that the area receives unsatisfactory off-the-air television reception, is not within the Grade A contour of KFMB-TV, and may be within the Grade B contours of some Los Angeles stations. Rancho Bernardo denies that it degrades the KFMB signal and alleges that a grant of temporary relief would irreparably injure it because it would impede the sales of homes and would not help KFMB since it would make its signal unavailable in the area. Rancho Bernardo requests denial of the temporary and permanent relief and asks that it be dismissed from the proceedings.

12. In its responsive pleadings, Midwest points out that there is no factual dispute as to Mission's and Southwestern's intentions to continue expansion throughout the various geographic areas covered by their franchises. Midwest contends that temporary relief is necessary to prevent this great expansion of these major market systems until resolution of the public interest questions presented. Midwest alleges that, similarly, with limited exceptions, there is no real dispute as to the regional and specific geographic areas described by it; that since respondents have not wired up all of the homes within the specific geographic areas designated, restriction to such areas, pendente lite, would not prevent normal wiring operations; and that, therefore, there is no showing by respondents that an interim stay would impair the ability

[385]

of the systems to continue operations. Midwest alleges that Mission makes no claim that its viability would be impaired and that Southwestern's claim of irreparable injury assumes a total prohibition against new subscribers; Southwestern does not claim that if it were limited to new subscribers within the specific geographic areas designated as of February 15, 1966, it would be irreparably injured.

13. Specifically, with respect to Mission, Midwest alleges that it has offered no factual information to refute the allegations of rapid line expansion; that Mission's map, in large part, confirms the boundaries specified by Midwest and, with one exception, Midwest will accept it as showing where Mission's systems were operating on February 15, 1966; that Mission's arguments regarding need for CATV service are invalid because 1) the entire public will lose if the local stations are forced off the air or required to curtail operations and 2) over 94% of the Los Angeles stations' programs have been, are, or will be essentially duplicated by the programming of the San Diego stations;

and that irreparable injury to Mission's systems has not been demonstrated since 1) there has been no showing that Mission's systems were not viable as of February 15, 1966, 2) there has been no showing that its franchises or contracts will expire or be forfeited if interim relief is granted (Midwest points out that the franchises do not require carriage of the Los Angeles stations and that the systems could expand without restriction carrying only San Diego signals); and 3) employee lay-off would occur only if respondents were ordered to halt all normal wiring and hook-up of new subscribers, but this has not been requested. Mission's county-wide grandfathering argument, contends Midwest, completely ignores the meaning of paragraph 149 of the Second Report and Order.

14. Midwest alleges, in response, that Southwestern does not challenge Midwest's designation of appropriate geographic areas and that since there are thousands of residents in these areas not yet on the cable, a grant of temporary relief as to Southwestern would not halt its normal wiring activities (Southwestern claims about 900 subscribers at present). Further, Midwest alleges, Southwestern's argument as to being "grandfathered" in the entire franchised area, because it was serving 350 subscribers on February 15, 1966, completely ignores the import of the Second Report and Order; Southwestern's attempt to show that its franchised area receives Grade B signals from Los Angeles is completely inadequate from an engineering standpoint and its market survey techniques are defective and its conclusions unsupported.[9/] Finally, Midwest contends

---

9/ Midwest points out that while cable subscribers interviewed had two UHF stations available to them (Channel 28, Los Angeles, and 39, San Diego) the Los Angeles UHF is not available off the air, and the survey only proves, at most, that viewers with two available UHF stations to watch, will view UHF 1.77 times as much as viewers with one, and that, if UHF viewing by cable subscribers is divided equally between the two stations, Channel 39 is viewed 11% fewer times in cable homes than in

non-cable homes. Midwest also pointed out that the survey proved nothing as to reception quality on cable since no distinction was made between Channels 28 and 39 and it was not determined whether the non-cable homes surveyed had UHF antennas.

[586]

that while Southwestern's allegations concerning impact relate to the short run benefits to UHF of carriage on CATV, these benefits decrease as penetration of all-channel receivers increases and that Southwestern has set forth no basis for being treated differently than the other respondents in this proceeding.[10/] As to Rancho Bernardo, Midwest states that in light of the representations as to extension Midwest will not press its request for temporary relief. However, Midwest contends that no basis has been shown for dismissal of Rancho Bernardo from the proceeding; that dismissal of Rancho Bernardo would have the effect of grandfathering an area 1350% larger than the area in which service is presently being rendered; and that no allegation has been made that Rancho Bernardo's participation would constitute a hardship to it or cause it damage.

15. With respect to its request for permanent relief, Midwest states that the real issue is whether CATV should be allowed to import distant signals which would result in impairing the service capabilities of network stations and threaten the continued existence of commencement of UHF stations; that carriage provides only short-run benefits to UHF stations; and that same-day non-duplication is insufficient because it has little relevance to non-network programs. In conclusion, Midwest requests that the Commission set the matter for hearing on the issues raised in the petition for permanent relief; that pending final disposition, the respondents be directed not to extend the Los Angeles stations' signals beyond the boundaries previously specified; and that Southwestern's motion to dismiss the petition for temporary relief and

Rancho Bernardo's petition to be dismissed from the proceeding be denied.

10/ Southwestern, in its responsive pleadings, repeats its allegations that its franchise area does receive Grade B signals from Los Angeles and that its system does not degrade the signals of KFMB-TV. It also attached a supplementary economic report purporting to show that CATV carriage does help UHF generally and Channel 39 specifically.

[587]

16. We think Midwest has presented a classic case for a hearing with respect to the general issues of expansion of respondents' CATV systems throughout the San Diego market area. At paragraph 149 of the Second Report and Order (2 F.C.C.2d 725), after stating our policy with respect to "grandfathering" the existing operations of CATV systems, we stated:

> "We turn now to the question whether systems extending signals beyond their Grade B contour on February 15, 1966, into one of the top 100 markets, are to continue to add subscribers in new geographic areas. Such systems, which may recently have gone into operation without regard to the Commission's explicit notice of the pendency of the paragraph 50 proposal, may have relatively few subscribers. In view of the public interest considerations upon which our policy is based, we do not believe that such a system should be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in an evidentiary hearing). While there may be a disruptive factor in halting CATV growth in the particular circumstances which should, of course, be taken into account, we believe that if at all practicable, ap-

> propriate geographical areas should be delineated, with the CATV growth limited to such areas until resolution of the issues. The problem calls for case-by-case judgment in the particular community as to the feasibility of action along the foregoing lines and the appropriate geographical area or areas. Our judgment will therefore be made upon the petition, if any, of the local broadcaster(s) objecting to the geographical extension of the CATV system to new areas, and responses thereto. The petition may also request temporary relief in the event an evidentiary hearing is found to be appropriate; the Commission will determine, upon the basis of the showing and response in the particular case, whether such temporary relief is called for, and if so, its nature."

This case falls squarely within the terms of the policy stated above. There is considerable UHF activity currently under way in San Diego with KAAR (d. 39) in operation until November, 1965, with an application pending for educational Channel 15, with an outstanding construction permit for Channel 51 (KJOG-TV) and plans to commence operation in the near future. Several of Mission's systems, and Southwestern's system, commenced operations only some two to four months prior to the filing of the petition herein. In view of the size of the area involved (approximately 380,000 housing

units in San Diego County), while the respondents' systems have relatively few subscribers, pursuant to their franchises, they have the potential for expanding throughout the entire county.

17. In this latter connection, Midwest has pointed out, and respondents have not denied, that there were on February 15, 1966, approximately 17,000 CATV subscribers in the county and within KFMB-TV's Grade A contour, of which approximately 6,500 were located in San

Diego. It was further pointed out that while this constitutes only 4.6% of the county homes within the station's Grade A contour, there are approximately 294,000 homes in the communities within this contour in which CATV systems carrying Los Angeles signals have begun to operate and that this represents approximately 78% of all homes in the county within the station's Grade A contour. Approximately 90% of all homes in the county within the station's Grade A contour are located in areas covered by CATV franchises. Mission states that construction in unincorporated communities in San Diego County has proceeded to the point where approximately 70% of the populated area adjacent to metropolitan San Diego has been wired and 30% of the homes in the wired area have subscribed. Thus, it clearly appears that a hearing is required with respect to the over-all question of whether such potential expansion in this major market is consistent with the public interest. Further, unless this expansion is appropriately limited pending resolution of the issues, within a very short period of time the systems could wire up thousands of new subscribers. We have made clear in the Second Report the impracticability of withdrawing service, once established, because of its disruptive effect. We have also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted. Accordingly, interim relief appropriately limiting further expansion until resolution of the public interest issues is called for.

18. A hearing is also appropriate here because of the number of unresolved issues present. For instance, there is disagreement as to whether some of respondents' systems are operating within the predicted Grade A contour of KFMB-TV; there is controversy as to whether some of the respondents' systems operate within the Grade B contour of some of the Los Angeles stations carried on the system (but in this respect, see also par. 19, infra.); there is a serious question as to

whether respondents' systems degrade the San Diego signals carried and particularly the signals of KFMB-TV; the degree of CATV penetration of the market is contested; and, of course, there is controversy as to whether carriage on the systems will help or hurt new or prospective UHF stations in San Diego. These issues are all particularly appropriate for resolution in an evidentiary hearing. We wish to stress that, in view of the importance and novelty of the matters raised, we think considerable latitude should be afforded as to the introduction of evidence on all of these matters.

19. Some of the respondents have alleged that since their systems operate within the predicted or measured Grade B contours of the Los Angeles stations carried on their systems, the provisions of paragraph 149 of the Second Report, *supra*, which relate generally to extension of beyond Grade B signals, do not apply to their systems and that they may, therefore, continue to expand without hindrance. This contention, however, misconceives the main thrust of our major market

[589]

policy. The Commission's primary concern with respect to CATV operations in the major markets importing distant television signals was whether such operation "may be of such nature or significance as to have an adverse economic impact upon the establishment or maintenance of UHF stations or to require these stations to face substantial competition of a patently unfair nature" (Second Report, Paragraph 139) We defined "distant signals" as those signals extended or received beyond the Grade B contours of those stations. While this standard will generally encompass our main area of concern (i.e., the importation of signals not allocated to the area), it is by no means a fixed and immutable standard to which we will blindly adhere. As we pointed out in the Second Report, CATV activity which does not involve extension of a signal beyond the Grade B contour may continue, ". . . with possibly only

the rarest exception . . . ." (Second Report, paragraph 151). This exception involves a situation where, for instance, two major markets fall within one another's Grade B contours and the importation of signals of the stations in one market into the other would equalize the quality of the distant signals, possibly change the viewing habits of the latter community and affect the development of independent UHF stations there. Assuming, arguendo, as respondents contend, that their systems are within the predicted or measured Grade B contours of the Los Angeles stations, this is exactly the situation presented here. The Los Angeles stations are located more than 100 miles from the San Diego main Post Office and, while they may provide service to some parts of San Diego, the issue is what kind of service as compared to that of the local San Diego stations, and what is the effect on the latter of CATV which "equalizes" the technical quality of the local San Diego signals and the more than 100 mile distant Los Angeles stations. Thus, the problem is not resolved merely by a showing that the Los Angeles stations do provide Grade B signals to parts of San Diego County.

20. It is clear, therefore, that a hearing is necessary with respect to the overall question of CATV expansion in this major market and that some form of temporary relief is necessary and appropriate "before consequences possibly adverse to the public may develop." Before discussing the nature and form of the temporary relief to be prescribed, there are three matters raised by respondents which we will briefly discuss.

[590]

21. First, respondents Mission and Southwestern Contend that the Commission lacks authority to furnish the temporary relief requested by Midwest, primarily on the ground that the cease and desist provisions of Section 312 of the Communications Act constitute the only basis for any

sort of interim action pending a hearing. However, we have determined in the Second Report that we have jurisdiction over CATV systems, and the statute gives us authority to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of [our] functions." Section 4(i). See also Sections 303(f) and (r). The provisions for temporary relief in situations of this sort which are contained in Sections 74.1107 and 74.1109 of our Rules constitute the exercise of such authority. Without this power to fashion our rules and orders to the practical necessities of the situation, we could not carry out the provisions of the Act. The only alternative would be to seek an immediate injunction in court in order to preserve our jurisdiction to enter an effective order after a hearing, see Federal Trade Commission v. Dean Foods Co., ____U.S.____, decided June 13, 1966. Such action would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission. We believe we have the authority for interim action contemplated by our rules, in view of the broad mandate of the Communications Act and the established principle that all authority of an agency need not be found in the explicit language of the statute where the agency is created to deal with a host of problems whose exact nature is unforeseen. See Public Service Commission v. Federal Power Commission, 327 F.2d 893, 896-897 (C.A.D.C., 1964).

[592]

president of the bank which has financed, and is committed for further loans to finance, the continued operations of Southwestern's CATV system. The affidavit states, in essence, that additional loans will not be made, pendente lite, if temporary relief is granted. This statement, however, refers to a stay against extension of service to additional sub-

scribers, and while the petition originally requested relief in those terms, Midwest subsequently revised its request for temporary relief. The affidavit also states that the bank will not advance the remainder of the funds committed unless Southwestern is legally free to continue to add subscribers in the area covered by its existing pole attachment agreements. But Southwestern has not alleged or shown that the temporary relief now requested would prevent it from adding subscribers in these areas. As Midwest pointed out, and Southwestern did not deny, since Southwestern claimed only 900 subscribers and there are thousands of residents in the specific geographical areas designated by Midwest, the temporary relief requested would not halt normal wiring activities and the addition of many new subscribers pending final disposition. This same observation also applies to Mission and, additionally, under the temporary relief requested, neither Mission nor Southwestern would be prevented from extending their systems throughout their franchise areas if they limited their operations to the carriage of the San Diego signals. Accordingly, we find that neither Mission nor Southwestern has demonstrated that they will be irreparably injured if some form of temporary relief is ordered.[12/] We also specifically provide that if some form of irreparable injury not here shown or anticipated should develop during the pendency of the hearing, Mission and Southwestern may bring such new developments to our attention and we shall afford expedited consideration.

22. The qeustion now is the nature and form of the temporary relief to be afforded. In its petition, and particularly the supplement thereto, Midwest specified with great particularity and precision "eight separate and discreet islands of CATV subscriber service as of February 15, 1966," alleging that these "islands" were located in recognized geographical areas in San Diego and that the islands were further circumscribed by recognizable and known geographical areas. These latter areas were also described with great precision and it was alleged

that from the eight islands, as they existed on February 15, 1966, the respondents have extended and are continuing to extend their lines and service beyond the boundaries within the geographical areas which they partially occupied and, also, into new geographical areas. Midwest asks essentially, that pending final disposition, respondents, be ordered to confine delivery of Los Angeles signals to subscribers located within the geographical boundaries inside of the eight general area which circumscribe the areas where the systems were operating on February 15, 1966. 13/

12/ We have considered Mission's request for oral argument with respect to the issue of temporary relief and do not believe that it would serve any useful purpose. Accordingly, the request will be denied. Other arguments advanced by respondents have also been considered and rejected.

13/ Midwest has indicated in a subsequent pleading that it does not object to dismissing Poway Cable TV from the proceeding and that it is not pressing its request for temporary relief as to Rancho Bernardo. Accordingly, we are only concerned with framing temporary relief as to Mission's and Southwestern's systems.

[591]

23. Neither Mission nor Southwestern has factually challenged Midwest's description and specification of the geographic areas and their boundaries. Rather, they take the position that their franchise areas constitute the appropriate geographic limitations. We have, however, rejected this contention (see paragraph 21, supra). Mission, with its opposition, submitted a detailed map which, in part, indicates for the entire area where systems were operating on February 15, 1966. Midwest states in its reply that the map, in large part, confirms the boundaries specified by it in its supplement and that, with one exception, Midwest will accept it as showing where Mission's systems were operating on February 15, 1966. We have also reviewed the map and compared it

with the specific boundaries detailed in Midwest's supplement and it appears that, with the exception of the Chula Vista area, the parties are largely in agreement as to the boundaries of the areas where Mission was operating on February 15, 1966.

24. Accordingly, we will grant temporary relief, pending final disposition of this proceeding, in the form of an order requiring Mission to confine delivery of the Los Angeles signals carried on its systems to subscribers within those areas where Mission indicated in its map (appended as attachment G to its opposition) it was operating on February 15, 1966. We will also accept Mission's map designation with respect to the Chula Vista area, provided, however, that our action with respect to Chula Vista is without prejudice to any further showing Midwest may present to support its position as to the geographic boundaries, as of February 15, 1966, of the area served by Mission's Chula Vista system. Upon an appropriate showing, we will give further consideration to Midwest's request to further restrict the Chula Vista system pending final disposition of this proceeding.

25. As to Southwestern, we have previously noted that it has not challenged Midwest's designation of the general and specific areas within which it was operating on February 15, 1966. Accordingly, we will grant temporary relief, pending final disposition of this proceeding, in the form of an order requiring Southwestern to confine delivery of the Los Angeles signals carried on its system to subscribers within those areas specified by Midwest in its supplemental petition (paragraphs (A)(1) and (B)(1), pages 10 and 12, respectively, and affidavit, paragraph 5(1), pages 2 and 3), appended thereto. This action will be subject to any further showing Southwestern may wish to present to show that the geographic boundaries of the area in which it was operating as of February 15, 1966, differ from these specified by Midwest. Upon an appropriate showing and request, we will give further consideration to the question of appropriate February 15, 1966, boundaries of Southwestern's systems.

26. It should be noted with respect to the temporary relief described above that both Mission and Southwestern are free to continue to construct lines and add new subscribers and to carry the Los Angeles signals within the specific geographic areas described above. As indicated, it would appear that there are substantial numbers of potential new subscribers located in those areas. Further, Mission and Southwestern may continue to expand their systems within their franchised areas so long as the expansion is confined to the carriage of the San Diego-Tijuana

[593]

signals. And, finally, respondents may continue their present service to any persons who began receiving service, or who had signed and submitted an accepted subscription request, between February 15, 1966, and the date of this order. As indicated in the Second Report, we have no desire to cause disruption of existing service and we do not, in any event, believe that a roll back is either practical or necessary. While we recognize that the temporary relief which we are ordering may, to some extent, discommode respondents' operations, we do not think that it will cause respondents either substantial hardship or irreparable injury. To the extent that there is some disruption of existing operations and future plans, we find that it is necessary in the public interest.

27. Accordingly, in view of the above, and pursuant to Sections 74.1109 and 74.1107(a) and (d) of the Commission's Rules, IT IS ORDERED, that this proceeding is hereby DESIGNATED FOR HEARING, at a time and place to be specified in a further order, upon the following issues:

1. To determine the locations of trunk and feeder lines (both energized and unenergized) and the location and number of

subscribers per half mile (or other comparable convenient unit of measure) of cable to respondents' respective CATV systems as of February 15, 1966, March 17, 1966 and the date of this order, and the locations of the predicted Grade A contours of the San Diego television stations and predicted Grade B contours of the Los Angeles television stations.

2. To determine whether the signals of any of the San Diego television stations are degraded on any of respondents' respective CATV systems and, if so, the cause, extent and nature thereof.

3. To determine the present actions and plans for the future of respondents with respect to the initiation of pay-TV operations based upon or in connection with their respective CATV operations.

4. To determine the present penetration of CATV service by CATV systems in the San Diego market area and the potential penetration of CATV service under conditions of unlimited expansion.

5. To determine the effects on the audiences of existing, proposed, and potential San Diego television stations of present penetration and of potential penetration under conditions of unlimited CATV expansion.

6. To determine the effects of present service and of unlimited expansion of service by CATV systems, generally, on off-the-air television service from the San Diego television stations and, particularly, on existing, proposed and potential UHF television service in the area.

7. To determine whether any conditions of future import should be placed on the present operations of respondents' CATV systems and, if so, the nature thereof.

8. To determine whether expansion of any of respondents' CATV systems should be limited and, if so, the appropriate conditions thereof.

9. To determine, in light of the foregoing, whether respondents' present or planned CATV operations are consistent with the public interest and what, if any, action should be taken by the Commission.

IT IS FURTHER ORDERED, that Midwest Television, Inc. the Chief, Broadcast Bureau, Mission Cable TV, Inc., Southwestern Cable Company, Pacific Video Cable Company, Inc., Trans-Video Corp., Rancho Bernardo Antenna Systems, Inc., and Jack O. Gross, are made parties to this proceeding.

IT IS FURTHER ORDERED, that respondents have the burden of proceeding and the burden of proof with respect to issue 1; that with respect to issue 2, petitioners have the burden of proceeding and the burden of proof; that respondents have the burden of proceeding and the burden of proof with respect to issue 3; that respondents have the burden of proceeding and the burden of proof with respect to issue 4 insofar as it relates to respondents' respective CATV systems, and that petitioner has the burden of proceeding and the burden of proof with respect to issue 4 insofar as it relates to CATV systems other than those of respondents; that petitioner has the burden of proceeding and the burden of proof with respect to issues 5 thru 8.

IT IS FURTHER ORDERED, that pending the outcome of this proceeding, respondents Mission Cable Television, Inc., Southwestern Cable Company, Pacific Video Cable Co., Inc., and Trans-Video Corp. ARE DIRECTED TO LIMIT the operations of their respective CATV systems as set forth in paragraphs 24-26, supra.

IT IS FURTHER ORDERED, that the Motion to Dismiss filed by Poway Cable Television IS GRANTED and it IS DISMISSED as a party to this proceeding.

IT IS FURTHER ORDERED, that the Motion to Sever and the Motion to Dismiss filed by Southwestern Cable Co. and the Petition to be dismissed filed by Rancho Bernardo Antenna Systems, Inc., ARE DENIED.

IT IS FURTHER ORDERED, that the request for oral argument of Mission Cable Television, Inc., Pacific Video Cable Co., Inc. and Trans-Video Corp. IS DENIED.

IT IS FURTHER ORDERED, that the petition filed by Midwest Television, Inc., and the supplement thereto, to the extent indicated above, IS GRANTED, and, in all other respects, IS DENIED.

IT IS FURTHER ORDERED, that, to avail themselves of the opportunity to be heard, the parties herein, pursuant to Section 1.221(e) of the Commission's Rules, in person, or by attorney, shall, within twenty (20) days of the mailing of this Order, file with the Commission in triplicate a written appearance stating their intention to appear on the date set for the hearing and present evidence on the issues specified in this Order.

IT IS FURTHER ORDERED, that the ruling as to temporary relief shall be effective on the 3d day, not counting Saturdays, Sundays and holidays, after the day of release of this opinion, provided that, the ruling on temporary relief shall not be effective until judicial determination of the motion for a stay in the case of any respondent which notifies the Commission within two days that it intends to seek judicial review and which seeks judicial review and a judicial stay within 14 days of the day of release of this opinion.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Adopted: July 20, 1966
Released: July 25, 1966

[596]

[Caption Omitted]

ERRATUM

In the Commission's Memorandum Opinion and Order in the above-entitled proceeding, released July 25, 1966, FCC 66-683, 86403, paragraph 21 is corrected to read as follows:

"21. First, respondents Mission and Southwestern contend that the Commission lacks authority to furnish the temporary relief requested by Midwest, primarily on the ground that the cease and desist provisions of Section 312 of the Communications Act constitute the only basis for any sort of interim action pending a hearing. However, we have determined

[596]

in the Second Report that we have jurisdiction over CATV systems, and the statute gives us authority to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of [our] functions." Section 4(i). See also Sections 303(f) and (r). The provisions for temporary relief in situations of this sort which are contained in Sections 74.1107 and 74.1109 of our Rules constitute the exercise of such authority. Without this power to fashion our rules and orders to the practical necessities of the situation, we could not carry out the provisions of the Act. The only alternative would be to seek an immediate injunction in court in order to preserve our jurisdiction to enter an effective order after a hearing, see Federal Trade Commission v. Dean Foods Co., __ U.S. ____, decided June 13, 1966. Such action would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a sub-

ject warranting the primary exercise of jurisdiction by the Commission. We believe we have the authority for interim action contemplated by our rules, in view of the broad mandate of the Communications Act and the established principle that all authority of an agency need not be found in the explicit language of the statute where the agency is created to deal with a host of problems whose exact nature is unforeseen. See Public Service Commission v. Federal Power Commission, 327 F.2d 893, 896-897 (C.A.D.C., 1964). Second, respondents Mission and Southwest contend that their systems are "grandfathered" to the limits of their franchises. We reject this position since it is totally inconsistent with the policy expressed in paragraph 149 of the Second Report (see, also, Letter to Telerama, Inc., 3 FCC2d 585). Finally, respondents contend that a grant of temporary relief will cause them irreparable injury[11/]. Mission's showing in this regard, however, is speculative, unsubstantiated, and proceeds on a mistaken understanding of the nature of the relief requested. Southwestern furnished an affidavit from a vice-president of the bank which has financed, and is committed for further loans to finance, the continued operations of Southwestern's CATV system. The affidavit states, in essence, that additional loans will not be made, pendente lite, if temporary relief is granted. This statement, however, refers to a stay against extension of service to additional subscribers, and while the petition originally requested relief in those terms, Midwest subsequently revised its request for temporary relief. The affidavit also states that the bank will not advance the remainder of the funds committed unless Southwestern is legally free to continue to add subscribers in the area covered by its existing pole attachment agreements. But Southwestern has not alleged or shown that the temporary relief now requested would prevent it from adding subscribers in these areas. As Midwest pointed out, and Southwestern did not deny, since Southwestern claimed only 900 subscribers

and there are thousands of residents in the specific geographical areas designated by Midwest, the temporary relief requested would not halt normal wiring activities and the addition of many new subscribers pending final disposition. This same observation also applies to Mission and, additionally, under the temporary relief requested, neither Mission nor Southwestern would be prevented from extending their systems throughout their franchise areas if they limited their operations to the carriage of the San Diego signals. Accordingly, we find that neither Mission nor Southwestern has demonstrated that they will be irreparably injured if some form of temporary relief is ordered.12/ We also specifically provide that if some form of irreparable injury not here shown or anticipated should develop during the pendency of the hearing, Mission and Southwestern may bring such new developments to our attention and we shall afford expedited consideration.

11/ Midwest has withdrawn its request for temporary relief as to Rancho Bernardo.

12/ We have considered Mission's request for oral argument with respect to the issue of temporary relief and do not believe that it would serve any useful purpose. Accordingly, the request will be denied. Other arguments advanced by respondents have also been considered and rejected.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Released: July 26, 1966

[SEAL]